STATE OF MICHIGAN

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DEPARTMENT OF ENVIRONMENTAL QUALITY

"Better Service for a Better Environment"

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RUSSELL J. HARDING, Director

August 28, 2000

VIA E-MAIL AND UPS

Title VI Guidance Comments
U.S. Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

To Whom It May Concern:

SUBJECT: Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs; Draft Revised Guidance for Investigating Title VI Administrative Complaints

Enclosed are comments submitted by the Michigan Department of Environmental Quality on the two U.S. Environmental Protection Agency draft guidance documents referenced above. Please contact Mr. Gary R. Hughes, Deputy Director, or Ms. Lynn Y. Buhl, Director of the Southeast Offices, if you have questions or need additional information. Mr. Hughes can be contacted at 517-241-7394, or by e-mail at hughesg@state.mi.us. Ms. Buhl can be contacted at 313-392-6480, or by e-mail at buhll@state.mi.us.

We urge you to consider these comments thoroughly, and hope that the final guidances will reflect our concerns and those of many other state environmental departments.

Sincerely,

Russell J. Harding
Director
517-373-7917

Enclosure
cc/enc: Mr. Gary R. Hughes, Deputy Director, MDEQ
Ms. Lynn Y. Buhl, Director, Southeast Offices, MDEQ
bcc/enc: Mr. Bryan Roosa, Governor's Washington Office

Michigan Department of Environmental Quality
Comments on US EPA Environmental Justice Guidance(s)

August 28, 2000

The United States Environmental Protection Agency ("US EPA") drew tremendous attention to the issue of Environmental Justice and the application of Title VI of the Civil Rights Act of 1964 ("Title VI") to environmental permitting processes by issuing its "Draft Interim Guidance for Investigating Title VI Administrative Complaints" ("Interim Guidance") in February 1998.

Despite widespread criticism, US EPA declined to withdraw the Interim Guidance and in fact used it to adjudicate the *Select Steel* complaint (US EPA File No. 5R-98-R5), finding no violation of Title VI in an opinion released in October 1998. The Director of the Michigan Department of Environmental Quality (MDEQ) participated in US EPA's Title VI Advisory Group and on other occasions also discussed the shortcomings of the Interim Guidance with Office of Civil Rights (OCR) and other US EPA staff. The MDEQ advocated: (1) revising the Interim Guidance after conducting more public outreach and affording a better opportunity for input from state and municipal officials, and (2) shifting away from the "tail-end" review, focusing more on how a potential Title VI issue can be identified early and addressed so that any adverse health or environmental impact is prevented. The MDEQ recommended that US EPA design a comprehensive process by which permitting under environmental laws can be conducted fairly and consistently, incorporating Title VI concerns as well as requirements of the underlying environmental statutes. Separately, or as part of a permitting process, a Title VI review process must be objective, replicable, based on sound science, and ensure consistent outcomes within and between states.

The US EPA then issued revised guidance in two documents published in the Federal Register on June 27, 2000. Those are entitled "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" ("External Guidance") and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" ("Internal Guidance"). Neither of these documents addresses MDEQ's fundamental concerns. The following comments are organized so that fundamental, overall concerns with how US EPA has approached the resolution of this issue are delineated in the next seven bullet points, followed by specific comments addressing technical and procedural details within particular provisions in one or both guidances.

- Deficient Public Outreach. First, although US EPA apparently solicited input from a variety of interested parties in the two years between issuance of the Interim Guidance and the revised guidances, its approach ironically has not provided the same level of outreach and opportunity for public comments that

it is professing should be done by the state environmental departments or other recipient agencies ("Recipients"). The guidances state that a Recipient must encourage public participation and outreach, noting that an effective public participation process must be early, inclusive, and meaningful. For example, the public participation process should use communications likely to reach the affected community and should schedule meetings at times and places that are convenient. The Internal and External Guidances were published in the Federal Register on June 27, 2000. While written comments can be submitted until August 28, 2000, the opportunity to provide verbal comments in no way represents effective public participation. The US EPA has identified seven listening sessions held around the country. However, the notice, location, and meeting times are not convenient for the majority of citizens. In fact, the first listening session, held in Washington, D.C. on June 26, 2000, was held prior to the Federal Register publishing of the two draft documents. Nearly half of the public listening sessions did not receive 30-day advance public notice. Next, the meetings were held at US EPA regional offices, which are somewhat centrally located, but certainly not convenient for the average citizen. Finally, comments were limited to five minutes. Setting time limits, especially one so short does not convey the message that comments are welcome. Rather than providing an opportunity for meaningful comments, US EPA appears to do everything they could to discourage or limit verbal comments.

- A comprehensive process is a better approach. In short, we favor a process that (1) allows a Title VI concern to be recognized early, and (2) allows the Fund Recipient or permit applicant or any other interested party an opportunity to address it effectively without US EPA involvement. The process should prevent a Title VI violation. The US EPA has declined to take the more proactive, preventative approach that MDEQ encouraged, that would essentially incorporate consideration of Title VI issues into the permitting process. The MDEQ continues to advocate that approach.

  Furthermore, it is an ineffective use of federal and state resources to create a process that scrutinizes the impact of a state permitting decision on the health of a surrounding community after it has been made. This is especially true when the triggering, timing and content of a US EPA review is vague and subject to judgment calls by OCR staff.

  The issuance of the permit should be the end result of a process that has already examined all aspects of its protectiveness of human health and the environment. A permit should be evidence that all legal requirements have been satisfied. This is what we mean by a comprehensive process.

- Examine whether the underlying environmental statutes are not protective. In both the Internal and External Guidances, US EPA continues to sidestep the fundamental allegation inherent in Title VI claims, which is that the underlying

environmental law is NOT adequately protective of human health and the environment in all instances. The guidances state simply that compliance with environmental laws does not constitute *per se* compliance with Title VI. An example is the National Ambient Air Quality Standards (NAAQS). The Clean Air Act requires US EPA to establish NAAQS that define the maximum permissible concentrations for the criteria pollutants. These standards are designed to protect the public health with an adequate margin of safety. The levels are set to protect the health of the most susceptible individuals in a population, including the children, elderly, and those with chronic respiratory ailments. The Internal Guidance indicates that this presumption could be negated if there are unusually high levels of the pollutant in other media – paint, soil, or water, in the case of lead. By law, the NAAQS are established to protect all individuals.

Furthermore, US EPA in the guidances concedes that tools such as detailed methodologies and monitoring data are not always available. Clearly, additional scientific research is needed to confirm the causal link between an emission and a health effect. Rather than presenting a plan for how those tools will be developed, US EPA simply prioritizes the existing (inadequate) tools for us, from most effective to least effective. Whether the Title VI review is separately or part of the permitting process, the tools must be developed to achieve an objective and fair result. A better approach would be to amend the enabling environmental statutes.

The US EPA should clarify and elaborate on the legal underpinnings that exist for US EPA to hold Recipients responsible for: (1) requiring additional actions or control measures from a permit applicant when the causal link between emission and impact is unproven; (2) addressing public health problems that go well beyond permitted emissions; and (3) coordinating efforts to address larger community issues. These concepts, which appear in the guidances, appear to us to exceed the authority granted to us under the enabling statutes. If we are misinterpreting those statutes, or Title VI somehow grants us the additional authority to make these judgments, we need to better understand the derivation and extent of that authority.

- <u>The process fails to provide certainty.</u> The Internal Guidance states on page 39669 that, “EPA may decide to follow the guidance provided in this document, or to act at variance with the guidance, based on its analysis of the specific facts presented.” This is not consistent, fair government when US EPA declines to articulate how differences in fact patterns will impact its decision(s) on whether to investigate a Title VI claim or to conclude that the law has been violated.

  The External Guidance contains numerous suggestions on how a Recipient may address Title VI issues earlier in the process. However, US EPA has stated repeatedly that compliance with its language or implementation of its suggestions is voluntary. The US EPA acknowledges that Recipients should

be allowed flexibility in designing their programs. However, a party considering taking some or all of the actions in the External Guidance should know how those actions will be treated by US EPA. In other words, there should be more certainty that the implementation of certain measures - voluntarily - will satisfy Title VI claims. The guidance indicates US EPA will give a Recipient's actions "appropriate due weight." Although the term is defined, its meaning is still vague. At a minimum, a Recipient who engages in certain of the suggestions in the External Guidance should get more favorable treatment under the Internal Guidance. More specifically, MDEQ recommends that the guidance establish a higher threshold for complaints or a higher burden of proof for a complainant in the situation where a Recipient engaged in efforts to address Title VI, but a complaint was filed nevertheless.

The Internal Guidance contains additional discussion of the "due weight" concept but offers no assurances that a Recipient's efforts to address Title VI concerns will be accorded any weight, even if existing adverse disparate impacts are eliminated or reduced. The US EPA leaves itself unquantified discretion by adding, "to the extent required by Title VI." In the end, the Internal Guidance outlines a series of judgment calls that are unpredictable, inevitably subjective and overall contrary to efficient and effective government. The result is that neither a Recipient, a permit applicant, a local government official, nor a member of an affected community can take action to resolve a Title VI issue with the confidence or certainty that its action addresses the problem.

- Burdensome on Resources. The External Guidance states "[y]ou may not necessarily have to hire new staff in order to address Title VI concerns. You may consider using existing staff and training them about Title VI. . ." This is simply naïve. It is important to note that US EPA has stated that the handling of Title VI concerns through the formal administrative process can consume a substantial amount of time and resources for all parties involved. The MDEQ staff devoted more than 100 additional hours to the *Select Steel* case in order to respond to US EPA's investigation. This extra effort cannot be sustained at an unlimited number of sites where the filing of a Title VI complaint requires little more than a modest familiarity with the facts and the belief that a violation has occurred.

  It is clearly important to the management of our department that we be able to anticipate when such additional time may be required and better yet, find ways to avoid such demand on staff time by changing the permitting process. In familiar terms, we believe "an ounce of prevention" is the better course to follow in terms of resource allocation and management. Since the guidances do not allow us the certainty we need to make resource judgments, we recommend that US EPA review the realistic impact of this guidance on Recipients and make a recommendation as to how all levels of government

involved in this issue can obtain adequate resources to implement effective programs.

- Scope of Review is Arbitrary. The guidances state that US EPA will only examine sources of stressors "within the [R]ecipient's authority." The External Guidance repeatedly encourages "bringing all agencies and parties together," yet acknowledges "you may not have the authority, resources or expertise to address all of the elements that may contribute to the issues of concern to the community." The Internal Guidance begins by echoing the "within the Recipient's authority" approach, but then references other laws such as state environmental policy acts. So, while US EPA is proposing to adhere to the *Select Steel* decision in defining the scope of its review, it leaves itself the option of looking at broader legal authority.

- No role defined for local governments. A related concern is that US EPA refrains from defining the role of local governments in the Title VI process. Obviously, local governments have an important role due to their authority over land use decisions and zoning. A better approach would be, as mentioned above, one that tries to prevent Title VI claims from arising – and that approach must include local government as a central player. Rather than tackle that task, it appears that US EPA wants to place the responsibility on state environmental departments to work with local governments and other interested parties to address larger community issues.

Specific Technical and Procedural Comments on Guidance Provisions

Adverse Disparate Impact Analysis

There are numerous portions of the adverse disparate impact analysis that lack clarity or appear to be particularly problematic in implementation. It is unfortunate that the section of the guidance document where the most prescriptive information is needed is the one without any bright lines. The US EPA indicates a recipient "should use the best available tools for conducting analyses to identify potential adverse impacts." They state that peer review tools and methodologies are the most credible. However, no guidance is provided on how to determine which is the best tool. The guidance should be establishing the protocol used in such an analysis. For example, specific answers are needed to the following types of questions or issues:

- The type of pollutants reviewed
- Do you use data on actual emissions or permitted (potential emissions)?
- What area do you look at – 1 mile, 3 mile, 6 mile radius circle or do you look at area of impact? What level of impact is the cut-off?
- Do you look at the last census data that may be 10 years old or do you use data from another source?

- When assigning population to an area based upon census block data, what do you do when only part of the census block is in the affected area? Do you assume it is proportional?
- How do you determine a comparison population?
- What happens if the facilities impacting the area in question aren't within your jurisdiction, i.e., another state or country?
- How do you account for demographic changes over time, especially since the last census?

In *Step 1: Assess[ing] Applicability*, there is an extremely broad definition of the types of permit actions which could form the basis for initiating a Title VI investigation, including any type of permit that would cause any amount of pollutant ("stressor") emission, or permit actions which allow existing conditions to continue unchanged. There are no *de minimis* conditions, or limits on the types of emission sources or of the magnitude or nature of the emissions, which would narrow the scope of the program. "Significant" (undefined) decreases in emissions may not support an investigation, as determined on a case-by-case basis, and will depend on the quantity and toxicity of emissions.

The program is also very broad in that the complaint does not need to specify the pollutants of concern. The US EPA will determine the relevant pollutant(s) of concern, based on the complaint's allegations and the permitting action at issue. These are examples of the numerous "judgment calls" that US EPA staff will be making under the Internal Guidance. Again, this is not fair, consistent government.

In *Step 2: Defin[ing] Scope of Investigation*, the Internal Guidance states that "OCR would expect to determine which stressors and impacts are within the recipient's authority to consider, as defined by applicable laws and regulations." So the type of stressor and universe of sources will be determined on a case-by-case basis by US EPA, which may include other air emission sources, background exposures, exposures via other pathways, etc. This is very uncertain, and may be very broadly inclusive. The guidance does not enable a recipient (e.g., State) to accurately foresee the scope of an OCR investigation, and therefore recipients cannot efficiently attempt to pro-actively address complaints.

In *Step 3: Impact Assessment,* the Internal Guidance presents four types of approaches from which OCR can select for a given set of circumstances. The first of these is, "Direct link to impacts." As noted in the guidance, this direct causal link between a stressor and an adverse impact will rarely be available. The second, "Risk," compares ambient monitoring data or modeled estimates of exposures, either singularly or cumulatively, to risk factors which will characterize the likelihood of toxic effects occurring. Thirdly, "Toxicity-weighted emissions" involves linking emissions to "toxicity potency factor scores," to derive toxicity-weighted stressor scores which are only relative in nature. This is of concern,

because this sort of approach is only appropriately applied as a screening step, and should not be employed by complainants or US EPA to assess charges of adverse impacts. The weighted score has no relationship to excess health risks, and has the danger of giving the impression that it can represent risk. The fourth approach, "Concentration levels," is essentially the same as the "Risk" approach described above, with more emphasis on benchmarks of concern. The MDEQ asserts that the primary appropriate approach is the estimation of risk, as via the "Risk" and "Concentration levels" approaches.

In *Step 4: Adverse Impact Decision*, inadequate direction is provided on how to determine if an impact is "significantly adverse." The definitions section (pages 39684-39686) defines "impact" as "…a negative or harmful effect on a receptor…" and, "Adverse impact" is defined as "…a negative impact that is determined by EPA to be significant, based on comparisons with benchmarks of significance..." "Significant" is defined as, "A determination that an observed value is sufficiently large and meaningful to warrant some action." It is painfully obvious that the textual discussion, and the definitions in the External Guidance, provide inadequate certainty of the triggers that are generally indicative of what constitutes an impact that is significantly adverse. This is one of the two crucial pillars of a disparate impact investigation. The US EPA states that OCR will utilize benchmarks for significance that are "provided under any relevant environmental statute, EPA regulation, or EPA policy". This adds little clarity.

The example provided on page 39680, "a. Example of Adverse Impact Benchmarks," is not of any real use. It states, "OCR would expect that cumulative risks of less than 1 in 1 million of developing cancer would be very unlikely to support a finding of adverse impact under Title VI," while US EPA "may make a finding in instances where cumulative risk levels fall in the range of 1 in 1 million to 1 in 10,000." The US EPA continues that, "OCR would be more likely to issue an adversity finding for Title VI purposes where the cumulative risk in the affected area was above 1 in 10,000." These represent criteria for the decision point, "…for proceeding further in the analysis." These criteria will likely fail to screen out many complaints, since the cumulative cancer risk from air pollutants is believed to be above 1 in 1 million everywhere in the U.S., and may be generally above 1 in 100,000 in major urban areas nationwide. For noncancer risk assessment, there is a lack of useful direction from US EPA on what will constitute an adverse impact.

On page 39680, it is stated that the NAAQS standard for lead may fail to ensure adequate protection due to background sources of contamination, therefore attainment with the lead NAAQS should not be presumed to be adequately protective against adverse impacts. This is consistent with the *Select Steel* decision, although not noted as such. The US EPA should ensure that the Internal and External Guidances are consistent with the *Select Steel* decision and confirm its precedential effect.

In *Step 5. Characterize Populations and Conduct Comparisons*, the External Guidance states on page 39681 that, “The affected population is that which suffers the adverse impacts of the stressors from assessed sources.” Just as there is inadequate definition of what is to be considered “significantly adverse,” this language fails to provide useful criteria for defining the affected population. Ensuing discussion by US EPA fails to enlighten on how risks or impact measures will be used to define this population. This is critical, since this step determines the population that will be evaluated demographically to determine disparity of impacts.

The description of the various ways that US EPA may choose to utilize as the reference area is intentionally very vague to give US EPA maximum flexibility. In turn, this lends no certainty or predictability to the investigative approach; it leaves open the question of which potential reference areas may be most appropriate, and what one does if the approaches give conflicting comparisons to the affected population area. It may be preferable to establish a procedure that the county or the state will always be the reference area.

The lack of consistency and clarity in the OCR’s investigations is summed up as, “Since there is no one formula or analysis to be applied, OCR intends to use appropriate comparisons to assess disparate impact depending on the facts and circumstances of the complaint” (page 39681). This approach does not ensure a fair and consistent result.

Step 6: Adverse Disparate Impact Decision contains a discussion of how OCR will determine whether the disparity is significant, or if the investigation will likely be closed. This discussion includes the factors to be taken into consideration, and refers to some potential use of statistical tests, but is generally very vague. Again, this approach does not ensure a fair and consistent result, and represents a moving target for parties trying to recognize and resolve the issue.

On page 39682, the Internal Guidance states that, “A finding of an adverse disparate impact is most likely to occur where significant disparity is clearly evident in multiple measures of both risk or measure of adverse impact, and demographic characteristics, although in some instances results may not be clear. For example, where credible measures of both the demographic disparity and the disparity in rates of impact are at least 2 times higher in the affected population, OCR would generally expect to find disparate impact under Title VI.” It seems that <u>many</u> urban areas in Michigan would meet these criteria at present due to urban demographics and our present understanding of urban air toxics concentrations. Therefore, one could “redline” these areas as likely settings for Title VI complaints, an idea no one supports. The US EPA qualifies this by noting, “However, for both demographic disparity and disparity of impact, there is no fixed formula or analysis to be applied.”

In summary, the sections of the External Guidance describing US EPA's investigation process have substantial and critical issues that are discussed in extremely vague terms. Numerous terms are either undefined or their definitions are too vague, simplified or cross-referencing. Although this may have been intentionally done for the purpose of retaining OCR's flexibility in its future investigations, the lack of clear definitions, triggers and procedures does not enable permitting agencies to consider potential pro-active programmatic changes and prevent viable Title VI claims from arising.

Legal/Procedural Issues

The US EPA's guiding principles used to develop the guidances are very broad and do not appear to be based upon law. These guiding principles are not included in 40 CFR Part 7 entitled Nondiscrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency. This part which codifies US EPA's Title VI regulations was promulgated on January 12, 1984. It is the regulatory framework upon which the guidance should be based. It is important that the guiding principles are realistic and based upon law. The statement "[I]ntergovernmental and innovative problem-solving provide the most comprehensive response to many concerns raised in Title VI complaints," while an excellent goal, is quite utopian. In the real world, the structure within and between governmental agencies, the division of power between the federal, state, and local governments, and the interaction between all the regulatory schemes are significant barriers. Recipients are being held responsible for solving a problem, or achieving such a goal, without being given tools or structure needed.

Both US EPA's implementing regulations (40 CFR Part 7) and the guidance documents encourage the resolution of complaints informally. The guidance documents strongly push the alternative dispute resolution ("ADR") process to reduce or eliminate the situation. Part of their reasoning is that the handling of Title VI concerns through the formal administrative process can consume a substantial amount of time and resources for all parties involved. It is important to note that resolution on an informal basis can also consume a substantial amount of time and resources, although perhaps not the federal agency's. Further, the ADR process would occur before the permit is issued. This may be in direct conflict with federal, state or local statutory requirements for the processing of permit applications. The guidance document is rather weak in providing detail on how to resolve such disputes. Instead it is suggested a Recipient offer to provide various forms of remediation. We remain concerned that unless there is total consensus on a form of remediation, a Title VI complaint will still be filed. Thus significant resources (by all participants) will have been spent to no avail. Since US EPA admits readily that "It will be a rare situation where the permit which triggered the complaint is the sole reason a discriminatory effect exists," there seems to be a disproportionate amount of pressure on the permitting process to address impacts whose source is unrelated. Again, it would improve the process if US EPA were to

create a higher burden of proof or a higher threshold for complaints when efforts, including ADR, have been undertaken to address an issue.

The External Guidance provides a menu of possible options from which a Recipient may choose to address Title VI concerns. In actuality, there are three identified: case-specific (based upon a permit submittal), area-specific (based upon red-lining an area), or both. In the area-specific approach, the process outlined appears to be very similar to the process identified in the Clean Air Act to address areas not meeting the NAAQS. When an area does not meet the NAAQS, a State Implementation Plan (SIP) call is made and a specific plan to solve the problem is developed. This plan includes one or more initiatives to reduce the pollutant in the specific area not meeting the standard. The initiative may be source specific reductions, targeted source category reductions, an across the board reduction for sources in that area, or a combination of both. In addition, any new source of that pollutant must install control technology that meets the lowest achievable emission rate and the source must also offset any proposed emission increase by reducing actual emissions of that pollutant by 10 percent. This assures that the air will continue to improve in that area. The Clean Air Act and state and federal law are the basis for this program. There is no mechanism for addressing cross media issues. In the area-specific approach for environmental justice, the same concepts are used, but there currently is no regulatory basis that would allow the state to make an "environmental justice SIP call" and certainly no leverage to enforce such a plan.

The US EPA creates a time frame for addressing its Title VI complaints that is unrealistic and unenforceable. It has not met similar time frames in its current regulations. The agency needs to clarify how it will discipline its own review in order to comply and expect compliance from others.

Further, the Internal Guidance creates too low of a threshold for filing complaints. First, the jurisdictional criteria should grant "standing" to someone who is truly impacted negatively. Secondly, it invites frivolous claims for the guidance to state that "complainants do not have the burden of proving that their allegations are true." At a minimum, the complainant should have to attest to the accuracy of his allegations and be subject to penalty if they are exaggerated or untrue.

As mentioned earlier, the *Select Steel* case was the first and only case adjudicated under the Interim Guidance. Neither guidance refers to the case. The US EPA needs to clarify how this administrative ruling under the Interim Guidance will be treated under the final Internal Guidance. The decision is an interpretation of law and regulations, so it would appear to represent precedent upon which Recipients can rely and to which US EPA must defer. The subsequent change in non-binding guidance should not affect the weight of the *Select Steel* decision as a legal ruling.

Neither guidance confirms that Title VI only applies to "protected classes." The US EPA should clarify the scope of Title VI and distinguish its reach from that of

Executive Order 12898. It is our understanding that the Executive Order requires federal agencies to consider both the protected classes under Title VI and low income populations in gauging whether there is a disproportionate negative impact from a federally-regulated activity. Title VI and hence the guidances do not have as broad an application, and apply to the Recipients of federal aid, not to the federal government. Notwithstanding these distinctions, we remain convinced that the better approach to resolving this issue would start with an examination of the underlying environmental statutes. If they do not adequately protect human health in all instances, then they should be revised. Demographic category is irrelevant to an assessment of human health. We want a process that protects all people. Neither of these two guidances nor the Executive Order would do so.